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No. 114

In the Supreme Court of the United States

OCTOBER TERM, 1930

VARIOUS ITEMS OF PERSONAL PROPERTY, ETC., THE WATERLOO DISTILLING CORPORATION ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 324) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 21, 1930. (R. 330.) The petition for certiorari was filed May 14, 1930. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether alcohol which has been diverted to beverage purposes after having been specially denatured to facilitate such diversion is subject to the tax imposed by Section 600 (a) (4) of the Revenue Act of 1918, as amended, upon distilled spirits diverted to beverage purposes.

2. Whether such "tax" is a penalty and, therefore, not within the contemplation of Sections 3257 and 3281 of the Revised Statutes, which provide for the forfeiture of the distillery of any distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or who engages in such business with intent to defraud the United States of such tax.

3. Whether Sections 3257 and 3281 of the Revised Statutes are directly in conflict with Sections 25 and 22, Title II, of the National Prohibition Act and, therefore, impliedly repealed by that Act.

4. Whether a prior conviction of the distiller of conspiracy to violate the National Prohibition Act bars the present suit to forfeit the distillery.

STATUTES INVOLVED

Section 3257 of the Revised Statutes (U. S. C., Title 26, Sec. 261) provides:

> Whenever any person engaged in carrying on the business of a distiller defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, he shall forfeit the distillery and distilling-apparatus used by him, and

all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Section 3281 of the Revised Statutes (U. S. C., Title 26, Sec. 306) provides:

Every person who carries on the business of a distiller without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and imprisoned not less than six months nor more than two years. And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be

there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Section 600 (a) of the Revenue Act of 1918, as amended (c. 27, Sec. 900, 44 Stat. 9, 104; U. S. C., Title 26, Sec. 245), provides, so far as material here:

SEC. 600. (a) There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, in lieu of the internal-revenue taxes now imposed thereon by law, an internal-revenue tax at the following rates, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law:

(1) Until January 1, 1927, $2.20 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon;

* * * * *

(4) On and after the enactment of the Revenue Act of 1926, on all distilled spirits which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage there shall be levied and collected a tax of $6.40 on each proof gallon or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the person responsible for such diversion. If a tax at the rate of $2.20, $1.65, or $1.10 per proof or wine gallon has been paid upon such distilled spirits a credit of the tax so paid shall be allowed in computing the tax imposed by this paragraph.

Section 5 of the Willis-Campbell Act, c. 134, 42 Stat. 222, 223 (U. S. C., Title 27, Sec. 3), provides:

That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the

National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

STATEMENT

This was a libel by the United States to forfeit a distillery, warehouse, and denaturing plant at Waterloo, New York. The libel charged in its first and second counts that between October 1, 1926, and March 1, 1927, the Waterloo Distilling Corporation had carried on the business of a distiller upon the libeled premises with intent to defraud the United States of the tax on the spirits distilled; that during the same period the said corporation had attempted to defraud and had defrauded the United States of such tax, and that in consequence of said acts the property libeled had become forfeited to the United States under Sections 3281 and 3257 of the Revised Statutes. The fraud alleged consisted of the withdrawal of alcohol, ostensibly for nonbeverage but actually for beverage purposes, without payment of the tax imposed by Section 600 (a) of the Revenue Act of 1918, as amended, upon distilled spirits diverted to beverage purposes. (R. 3–9.) A third count, drawn under Section 3453 of the Revised Statutes, was dismissed on stipulation. (R. 9–11, 38.) Answers to the libel were filed by the Waterloo Distilling Corporation, the Seneca Solvents & Chemical Corporation, Max Rein and Fannie Rein, the peti-

tioners, the last three claiming title to parts of the libeled property under deeds from the Waterloo Distilling Corporation. (R. 14–31.)

After the jury was sworn but before the taking of testimony, counsel for the respondents moved to dismiss the libel on the ground that the Government had previously elected to proceed against the Waterloo Distilling Corporation and others upon the charge of conspiracy to violate the National Prohibition Act (see *United States* v. *Austin-Bagley Corporation*, 31 F. (2d) 229) and was accordingly barred from proceeding in the present case to forfeit the property of that corporation under the internal revenue laws. The motion was denied and an exception noted. (R. 45–46.) At the trial the Government introduced evidence to show that during the period from October, 1926, to March, 1927, the Waterloo Distilling Corporation was operating an industrial alcohol plant, a bonded warehouse and a denaturing plant at Waterloo, New York, under Government permits (R. 48–52); that during that period it had withdrawn large quantities of alcohol from its bonded warehouse ostensibly for complete denaturation at its denaturing plant, but that it had in fact only specially denatured such alcohol and had thereupon shipped it under false billings to fictitious consignees (R. 83–92: 151–152).

The jury returned a verdict in favor of the libelant (R. 275) and judgment was entered declaring

the libeled property forfeited to the United States (R. 39–41). Upon appeal the judgment was affirmed. (R. 330.) Certiorari is asked on the grounds: (1) That the article diverted was not "distilled spirits," but was denatured alcohol, which is not subject to tax, and that Section 600 (a) had no application in this case; (2) that under the decisions of this Court in *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Corporation* v. *Wardell*, 260 U. S. 386, the "tax" imposed by Section 600 (a) upon distilled spirits diverted to beverage purposes is in reality a *penalty* and, therefore, the provisions of Sections 3257 and 3281 of the Revised Statutes, forfeiting property of a distiller who defrauds or attempts to defraud the United States of a *tax*, or who engages in such business with intent to defraud the United States of a *tax*, had no application to such penalty; (3) that Sections 3257 and 3281 of the Revised Statutes are respectively in direct conflict with Sections 25 and 22, Title II, of the National Prohibition Act, and were therefore impliedly repealed by that Act; and (4) that as the Waterloo Distilling Corporation and others had previously been indicted and convicted on the charge of conspiring to violate the National Prohibition Act because of the transactions involved in the instant case, the Government was barred by Section 5 of the Willis-Campbell Act from proceeding to forfeit the distillery of that company.

ARGUMENT

I

THE ARTICLE DIVERTED TO BEVERAGE PURPOSES WAS DISTILLED SPIRITS SUBJECT TO TAX UNDER SECTION 600 (a) (4) OF THE REVENUE ACT OF 1918, AS AMENDED

Because the pure alcohol which was withdrawn by the distiller from its bonded warehouse was specially denatured before being disposed of to purchasers with the object, as must be presumed to have been found by the jury, that it should be "cleaned" and ultimately used for beverage purposes, the petitioners contend that the diversion was not of "distilled spirits" but of denatured alcohol and that the tax imposed by Section 600 (a) (4) of the Revenue Act of 1918, as amended, accordingly did not apply. We submit that the diversion to beverage purposes began when the alcohol was withdrawn with the intent that it should ultimately be used for such purposes and that the denaturation was but a step in such diversion.

II

THE TAX IMPOSED IN THIS CASE UNDER SECTION 600 (A) OF THE REVENUE ACT OF 1918, AS AMENDED, IS WITHIN THE CONTEMPLATION OF SECTIONS 3257 AND 3281 OF THE REVISED STATUTES

Petitioners cite *Lipke* v. *Lederer*, 259 U. S. 557, and *Regal Drug Co.* v. *Wardell*, 260 U. S. 386, as establishing that the "tax" imposed by Section 600 (a) of the Revenue Act of 1918, as amended, is in reality a "penalty" and from this they argue that the defrauding or attempting to defraud of

such tax by a distiller, or the engaging in the business of a distiller with the attempt to defraud thereof, are acts not within the contemplation of Sections 3257 and 3281 of the Revised Statutes.

The cases cited lay down the rule that where a "tax" is imposed upon dealings which are made criminal by law and the essential purpose of the "tax" is that of "punishment for infraction of the law" such an imposition, though called a tax, is in reality a penalty and can not be lawfully collected by distraint upon an assessment made without notice and hearing given the person called upon to pay it. Within this rule the *Lipke case* held that the so-called "double tax" imposed by Section 35, Title II, of the National Prohibition Act upon the illegal manufacture or sale of liquor is a penalty rather than a tax.

The same conclusion was reached in the *Regal Drug Co. case* with respect to the tax of $6.40 imposed by Section 600 (a) of the Revenue Act of 1918, *but only in so far as the tax of $6.40 exceeded the basic tax of $2.20 imposed by that section.* Section 600 (a) imposed a tax of $2.20 per gallon "on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States." (C. 18, 40 Stat. 1057, 1105.) In the *Regal Drug Co. case* this tax of $2.20 had been paid by the distiller (260 U. S. 386, 388, 389; see also the record in that case, No. 108, October Term, 1922, pp. 4–5, 7), and the taxing authorities were only endeavoring

to collect the sum of $4.20 per gallon, the difference between the tax paid upon the lawful withdrawal of the distilled spirits and the total tax of $6.40 imposed by Section 600 (a) when the distilled spirits were diverted to beverage purposes.

In the instant case no taxes under Section 600 (a) have been paid and the amount charged by the taxing authorities against the petitioners is the entire tax of $6.40. This sum by the express terms of Section 600 (a) (4) includes the underlying or basic tax of $2.20 which is exacted *for dealings which may be permissible and lawful.* Neither the *Lipke case* nor the *Regal Drug Co. case* decides that *this* part of the sum of $6.40 is not a real tax. While there may be some doubt as to the limits of the rule of the *Lipke* and *Regal Drug Co. cases,* in view of the subsequent statements of this Court that "a tax on intoxicating liquor does not cease to be such because the sovereign has declared that none shall be manufactured, and because the main purpose in retaining the tax is to make law-breaking less profitable" (*United States* v. *One Ford Coupe,* 272 U. S. 321, 326–327; *Murphy* v. *United States,* 279 U. S. 630, 631–632), it is submitted that to the extent that the total tax set forth in Section 600 (a) (4) represents an imposition upon lawful, permissible dealings, it is a real tax and not a penalty. It was expressly so held in *United States* v. *One Ford Coupe, supra,* p. 328.

Since the "tax" upon which the present forfeiture proceedings are based includes the basic,

underlying tax which is imposed upon all the dealings described, lawful as well as unlawful, a portion, at least, of the impositions here involved is a real tax and hence within the provisions of Sections 3257 and 3281 of the Revised Statutes.

In *United States* v. *One Ford Coupe, supra,* pp. 328–329, this Court said with reference to the impositions here involved:

> With respect to the character of the impositions called taxes there is nothing in either the Revenue Acts or the Prohibition Act which makes any distinction between the product of legal and illegal distillation. The Acts left in effect the basic tax of $2.20 per gallon, *which was and is a true tax on the product, whether legally or illegally distilled,* and added to it the additional amounts in case of illegal distillation or diversion to illegal uses. These additional amounts also are called taxes by Congress, and were understood by it to be such. Whether they were intrinsically penalties and should be treated as such we need not determine. The basic tax of $2.20 a gallon on liquor illegally produced is not imposed because of illegality, but despite of it. It is a tax within the meaning of § 3450. (Italics ours.)

Thus, in this case, the basic tax of $2.20 a gallon is a tax within the meaning of Sections 3257 and 3281 and it is not necessary to consider whether the additional amounts called taxes by Congress must be regarded as penalties and therefore not within the meaning of these sections.

III

SECTIONS 3257 AND 3281 OF THE REVISED STATUTES WERE NOT REPEALED BY SECTIONS 25 AND 22, TITLE II OF THE NATIONAL PROHIBITION ACT

The petitioners next assert that Section 3257 was impliedly repealed by the National Prohibition Act and was not reenacted by the Willis-Campbell Act because it is "directly in conflict" with Section 25, Title II, of the National Prohibition Act. Section 25 declares it to be unlawful to possess any liquor, or property designed for the manufacture of liquor, intended for use in violating Title II of the Act, and provides that if it is found that such liquor or property is unlawfully possessed it shall be destroyed unless the court shall otherwise order. Section 3257 provides punishment by fine and/or imprisonment and for the forfeiture of property of the distiller who defrauds or attempts to defraud the United States of the tax on the spirits distilled by him. Section 3281 provides punishment by fine, and/or imprisonment and for the forfeiture of property of the distiller who conducts his business with intent to defraud the United States of the tax on the spirits distilled by him. Sections 3257 and 3281 are not in direct conflict with Section 25 of Title II of the National Prohibition Act, nor are they in conflict with Section 22, Title II, of the National Prohibition Act, which provides for the abatement of liquor nuisances and the closing of premises upon which they are maintained. *United States* v. *One Ford Coupé,* 272 U. S. 321. Each

offense is distinct. *Albrecht* v. *United States,* 273 U. S. 1. Moreover, Section 3281 was among the statutes which this Court specifically held in *United States* v. *Stafoff*, 260 U. S. 477, had been reenacted by the Willis-Campbell Act, and Section 3257, which had been specifically held repealed in *United States* v. *Yuginovich*, 256 U. S. 450, was clearly included among the statutes referred to in the following language of the *Stafoff case* (p. 480):

> But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms.

IV

THE PRESENT PROCEEDINGS ARE NOT BARRED UNDER SECTION 5 OF THE WILLIS-CAMPBELL ACT BECAUSE OF THE CONVICTION OF THE WATERLOO DISTILLING CORPORATION AND OTHERS FOR CONSPIRACY TO VIOLATE THE NATIONAL PROHIBITION ACT

The petitioners' final contention is that by virtue of the provision of Section 5 of the Willis-Campbell Act, that where an act is a violation of the prior laws relating to liquor and also of the National Prohibition Act, a conviction for such act under the one shall bar a prosecution therefor under the other, the present suit was barred by the prior conviction of the Waterloo Distilling Corporation of conspiracy to violate the National Prohibition Act. (See *United States* v. *Austin-Bagley Corporation,* 31 F. (2d) 229.)

The prior conviction relied upon was for conspiracy in violation of Section 37 of the Criminal Code. True, the conspiracy was to sell alcohol for beverage purposes in violation of the National Prohibition Act, but there was no conviction for any act in violation of the National Prohibition Act, or for any offense thereunder. Nor can it be said that a proceeding to forfeit property is a "prosecution." *United States* v. *One Ice Box*, 37 F. (2d) 120 (N. D. Ill.); *United States* v. *385 Barrels, etc., of Wine*, 300 Fed. 565 (S. D. N. Y.). Consequently, Section 5 of the Willis-Campbell Act, quoted *supra*, can have no application, and this case is governed by principles of criminal law and procedure of general application, which are not dependent upon the Willis-Campbell Act. Conviction of the crime of conspiracy does not bar prosecution for the substantive offense. Nor does the conviction of the owner of a distillery for violation of the internal revenue laws bar proceedings to forfeit his property seized because of such violation. *United States* v. *Three Copper Stills*, 47 Fed. 495 (D. C., D. Ky.); *United States* v. *One Machine for Corking Bottles*, 267 Fed. 501 (W. D. Wash.). See *Wood* v. *United States*, 204 Fed. 55 (C. C. A. 4th); *United States* v. *Olsen*, 57 Fed. 579 (N. D. Cal.).

The case of *United States* v. *La Franca* (No. 74, October Term, 1930, now pending in this Court on a writ of certiorari), asserted by petitioners to be "identical" with the present case, was a suit to

recover taxes and penalties and did not involve any forfeiture proceedings.

CONCLUSION

The case was correctly decided below and no adequate reason is advanced to justify review by this Court. The petition should be denied.

Respectfully submitted.

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